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NO. 20182

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

MADELINE CURRY, ADMINISTRATRIX OF THE ESTATE OF JACK CURRY, DECEASED,	)
Appellant,	)
vs.	)
FRED OLSON LINE, a corporation, A/S GANGER ROLF, A/S BORGA and A/S BONHEUR,	)
Appellees.	)

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

I

JURISDICTION.

This was an action for damages resulting from the claimed wrongful maritime death of Appellant's decedent brought in the District Court on the basis of diversity of citizenship of the parties and pursuant to the remedy provided by the California Wrongful Death Act. California Code of Civil Procedure, Section 377.[1]

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1 *Text of Statute, Appendix A. California has also enacted a tort survival statute, but it is not at issue in the instant case. Civil Code §§ 956, (Added Stats. 1949, c. 1380, p. 2400, § 20).*

The District Court had jurisdiction as provided by Title 28 U.S.C. Section 1332. Jurisdiction is noted in the pleadings. See the amended complaint, Tr. p. 1.

This court has jurisdiction on an appeal from a final judgment of the District Court. Title 28 U.S.C. Section 1291.

II.

STATEMENT OF THE CASE AND QUESTION INVOLVED

One question only is raised by this appeal.

Do the words "wrongful act and neglect" used in the California Wrongful Death Act embrace an action for "unseaworthiness" as that right is known to the general maritime law, but which right may be enforced by an action either in admiralty or at law? *Sieracki vs. Seas Shipping Co.* (1945) 328 U.S. 85, 88, 66 S. Ct. 872, 874, 90 L. Ed. 1099, 1946 A.M.C. 698.

This issue was presented to the Court below by Appellees' (defendants) "Motion for Partial Summary Judgment" (Tr. p. 10) wherein the District Court was asked to dismiss the second cause of action of Appellant's (plaintiff) amended complaint (Tr. p. 3) which was based on a claim of unseaworthiness of the vessel upon which decedent met his fatal injuries.

After hearing, the District Court granted the Motion, relying solely on the decision in *Mortenson vs. Pacific Far East Lines Inc.* (N. D. Cal. 1956) 148 F. Supp. 71.

This appeal directly challenges the correctness of that ruling.

III.

SPECIFICATION OF ERRORS RELIED UPON

The errors upon which Appellant relies are as follows:

1. The trial court erred in granting Appellees' "Motion for Partial Summary Judgment" as to the second cause of action in Appellant's amended complaint.

2. The trial court erred in ruling that an action for damages under the California Wrongful Death Act could not be predicated upon a claim of unseaworthiness.

IV.

ARGUMENT

"UNSEAWORTHINESS" IS A "WRONGFUL ACT AND NEGLECT" WITHIN THE MEANING OF THE CALIFORNIA WRONGFUL DEATH ACT.

There is no decision by the California appellate courts concerning the question at hand, so we must look to the federal cases, to analogous situations in California and other states, and to logic and reason to assist us in reaching the right result here.

1. SOME HISTORICAL OBSERVATIONS.

At the outset, it has long been settled law that the federal courts will entertain an action under the California Wrongful Death Act where the action is based upon negligence and the requisite jurisdictional needs are met. *Western Fuel Co. vs. Garcia* (1921) 257 U.S. 233, 42 S. Ct. 89, 66 L. Ed. 210.

In this early and only case involving the California Wrongful Death Act to reach the Supreme Court, there is support for our view that the Statute provides more than a "negligence" remedy, and encompasses the full protection of admiralty, including a remedy for unseaworthiness.

The Court writes, 257 U.S., pp. 241-242,

> "We have recently discussed the theory under which the general maritime law became a part of our national law and pointed out the inability of the states to change its general features so as to defeat uniformity - but the power of the states to make *some modifications or supplements* was affirmed. And we further held that *rights and liabilities* in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are *controlling wherever suit may be instituted.* Under this view *American Steamboat vs. Chace,* 16 Wall. 531, 21 L. Ed. 369 and *Sherlock vs. Alling,* 93 U. S. 99, 23 L. Ed. 819, support the right to recover under a *local* statute in *admiralty* for death occurring on navigable waters within the state when caused by tort there committed.
>
> " * * * We think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by *wrongful act,* the admiralty courts will entertain a libel in personam for damages sustained by those to whom such right is given. The subject is *maritime* and *local* in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern Pacific Co. vs. Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086." (Emphasis added.)

Since there was no right to recover damages for wrongful death under the maritime law, *THE HARRISBURG* (1886) 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358, any more than such right existed originally under the common law, it required statutory remedies to allow such right of recovery. For deaths occurring on the high seas Congress in 1920 enacted the Death on the High Seas Act (Act of March 30, 1920, c. 111, Sec. 1, 41 Stat. 537, 46 U.S.C. Secs. 761-768)[2] and for deaths to merchant seamen, wherever they occurred, Congress provided the Jones Act (Act of June 5, 1920, c. 250,

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2 *Text of Statute, Appendix A*

Sec. 33, 41 Stat. 1007, 46 U.S.C. Sec 688).[3]

The Lord Campbell Acts remedied the harsh common law rules which had denied a recovery for death, and the several states have all enacted their own versions of such remedial statutes, of which C. C. P. Sec. 377 is one. See *Harper & James, "The Law of Torts"*, Little, Brown & Co., 1956, Vol. 2, pp. 1284-1289.

These statutes have in turn provided a remedy for deaths occurring on waters within a state's jurisdiction, as well as on land, *Western Fuel Co. vs. Garcia, supra. Cf. Just vs. Chambers* (1941) 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903, 1941 A.M.C. 430.

As far back as 1907 it became evident that state wrongful death acts, with whatever *remedial* and *substantive* remedies they afforded, would be enforced in admiralty. In *The HAMILTON* (1907) 207 U.S. 398, 28 S. Ct. 133, 52 L. Ed. 264, the Supreme Court affirmed a decree in admiralty awarding damages under the Delaware Wrongful Death Act (Del. Laws 1901, Vol. 31, p. 500) in a limitation proceeding growing out of deaths to crew and passengers from a collision of vessels at sea. It is interesting to note that the state act was applied to an incident outside its territorial waters (this was of course before the Death on the High Seas Act occupied the field). Mr. Justice Holmes expressed a view that is as persuasive today as it was more than fifty years ago, 207 U.S., p. 405,

> "We pass to the * * * question - whether the state law, being valid, will be applied in admiralty. Being valid, it created an *obligatio*, - a personal liability of the owner of *The Hamilton* to the claimants. * * * This of course the admiralty would not disregard, but *would respect the right when brought before it in any legitimate way.*" (Emphasis added.)

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3 *Text of Statute, Appendix B*

It is said that the admiralty courts (and the federal courts on the law side, present jurisdiction) will entertain an action for death on navigable waters of a state which by statute has created a cause of action for wrongful death and in such cases the state statute will supplement the general maritime law. *Skovgaard vs. The M/V TUNGUS* (3 Cir. 1957) 252 Fed. 2d 14, 16, 1958 A.M.C. 619, 621. "When death occurs on navigable waters within a state whose statutes have created a cause of action for death by wrongful act, admiralty courts will entertain such an action by permitting the state statute to supplement the general maritime law."

In noting the application of state law to maritime causes of action, Justice Frankfurter in *Romero vs. International Term. Operating Co.* (1959) 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368, 1959 A.M.C. 832, stated 358 U.S. p. 373,

> "State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes."

Thus, a complete scheme at present, and for some years past has existed to allow such actions for death on account of wrongful act, whether such acts occur on land or on water, and if on water, territorial or the high seas. And whether such torts occur on *land* or *water*, if they are *maritime* in character, *the substantive maritime law applies. Gutierrez vs. Waterman S. S. Co.* (1963) 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297, 1963 A.M.C. 1649.

But this latter statement is the nub of controversy.

For the unseaworthiness rule is unknown to the common law. It is a doctrine unique and indigenous to the admiralty law, *The OSCEOLA* (1903) 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760, albeit enforceable at law in a proper case. *Sieracki vs. Seas Shipping Co., supra,* and *cf. Intagliata vs. Shipowners & Merchants Towboat Co. Ltd.* (1945) 26 Cal. 2d 365, 159 Pac 2d 1.

2. THE ARGUMENT THAT UNSEAWORTHINESS IS NOT WITHIN THE PURVIEW OF THE CALIFORNIA WRONGFUL DEATH ACT.

But it is argued that the wrongful death acts, California's included, are statutes which only allow actions based upon negligence, which unseaworthiness most assuredly is not, and that since contributory negligence of decedent is a bar to an action under the California Wrongful Death Act, *Buckley vs. Chadwick* (1955) 45 Cal. 2d 183, it follows that an action based on unseaworthiness, wherein contributory negligence mitigates damages but does not bar the action, is not within the purview of the California Wrongful Death Act.

3. ALL THE WORDS USED IN THE CALIFORNIA WRONGFUL DEATH ACT HAVE SEPARATE AND INDIVIDUALLY SIGNIFICANT MEANINGS.

The argument we are called upon to answer is both specious and begs the main question. For the wrongful death acts, California's included, are something more than mere negligence statutes.

The California statute here involved, C. C. P. Sec. 377, in its material part, provides:

> "When the death of a person * * * is caused by the *wrongful act or neglect* of another * * * his heirs or personal representative may maintain an action for damages against the person causing the death * * *" (Emphasis added.)

The words employed in most states are death by "wrongful act, neglect or default", while the California statute employs the words "wrongful act or neglect". The absence of the word "default" is not critical, since the controlling words with which we are here concerned are "wrongful act", and they can be construed to include "default".

Although we do not believe it necessary to support our view that unseaworthiness is within the statute's purview, at least one well respected Court has held that "neglect" covers a breach of the warranty of seaworthiness.[4]

We read the California statute to allow an action based upon negligence, and probably unseaworthiness, insofar as the word "neglect" is concerned, but to unquestionably allow an action for other tortious or wrongful but non-negligent conduct, including seaworthiness, insofar as the words "wrongful act" are concerned.

Thus the "contributory negligence" argument as a complete defense to any action under the California Wrongful Death Act is fallacious. Under any circumstances it would apply only to actions based on "negligence" *Buckley vs. Chadwick, supra.*

4. EVEN "CONTRIBUTORY NEGLIGENCE" WILL NOT BAR A MARITIME DEATH ACTION BASED ON THE STATE ACT.

It can be logically and forcefully argued that maritime death actions predicated on negligence (as opposed to unseaworthiness) are not barred by contributory negligence, but only that damages may be reduced.

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4 See infra, p. 17, Judge Learned Hand in the Halecki case.

This result follows from the basic proposition that maritime torts are resolved according to principles unique to that law in accordance with the long established rule that the general maritime law is federal law which supercedes or enlarges state law where maritime matters are concerned and is "a system of law coextensive with, and operating uniformly in, the whole country." *Southern Pacific Co. vs. Jensen* (1917) 244 U.S. 205, 215, 37 S. Ct. 524, 61 L. Ed. 1086.

This supremacy of the federal maritime law was noted and followed by the California Supreme Court in *Intagliata vs. Shipowners, etc., supra,* where, in a collision between vessels in state waters, the court held that contributory negligence was not an available defense, but that the controversy must be resolved by the federal "mutual fault" rule invoked in such maritime collision cases.

> "* * * The effect of contributory negligence is governed by the law under which the cause of action was acquired rather than by the law of the forum. * * * 'The fact that a federal right is to be ascertained in a state rather than in a federal court does not make it any less the duty of the court to apply federal law.'" *Intagliata, supra,* 26 Cal. 2d at p. 375.[5]

5. UNSEAWORTHINESS IS A "WRONGFUL ACT" AS THOSE WORDS ARE EMPLOYED IN THE CALIFORNIA WRONGFUL DEATH ACT.

The concept of what is a "wrongful act" resulting in death within the meaning of the general maritime law and applying the California Wrongful Death Act has not yet been passed upon by the California courts, nor any federal appellate court. We must turn to the decisions of other forums for guidance.

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5 *And see the discussion, infra, pp. 12-14, 18-23.*

One of the most persuasive and pertinent opinions to our case is that in *Skovgaard, Admx, vs. The M/V TUNGUS, supra*, wherein the Court of Appeals for the Third Circuit had occasion to review the New Jersey Wrongful Death Act (N.J.S.A. 2A:31-1, *et. seq*). The decedent went aboard a vessel to make repairs to a pump which had burst causing a spill of hot cocoanut oil on the vessel's deck. Decedent slipped on the oil and fell to his death in a tank of hot cocoanut oil. His administratrix brought an action for damages containing two counts, one based on unseaworthiness, the other on negligence. The District Court dismissed the libel, holding that an action for death by unseaworthiness did not lie in the general maritime law, (the precise point made by appellees here) and as to the negligence question, the vessel did not owe a duty to decedent to clean up the oil spill. The Court of Appeals reversed the District Court opinion in its entirety. In passing upon the unseaworthiness question which is vital to our case, the Court said, 252 Fed. 2d 14, p. 17, 1958 A.M.C. p. 622,

> "The nature of the conduct which will create liability under the New Jersey statute is of crucial importance. The legislature describes it as 'wrongful act, neglect or default.' It is presumed that the legislature did not employ useless verbiage and that each word has independent meaning. * * * The conduct required to impose liability, therefore, *is not limited to that conduct embraced in the historical concept of negligence. The words encompass something more.*
>
> "It is urged that since unseaworthiness is spoken of as a species of liability without fault, it cannot be a 'wrongful act, neglect or default' within the meaning of the statute. However, the characterization of unseaworthiness as liability without fault is dangerously deceptive. For urgent and sound reasons of public policy, the law has

> imposed the absolute duty upon the shipowner to provide a seaworthy vessel, and liability results only as a consequence of the breach of that duty. If 'fault' means negligence alone, of course no fault is required, and to that extent only, the phrase 'liability without fault' is accurate. But to *say that one who breaches a duty is without fault is a logical as well as a legal incongruity.*
>
> "The seaman possesses the legal right to a seaworthy ship. Whenever this legal right is infringed and harm results by *reason of the ship being unseaworthy, a 'wrong' occurs, whether it be of omission or commission.* The Supreme Court of New Jersey has defined 'wrongful act' as 'any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right.' *Louis Schlesinger Co. vs. Rice,* 4 N.J. 169, 72 A. (2d) 197, 203 (1950). Culpability is not necessary to constitute a wrong. *It is the liability-creating quality of an act which makes it wrongful.*
>
> "If it be said that the New Jersey Act provides redress for tortious conduct alone, we answer that *providing an unseaworthy ship is a tort.* As was said in *Strika vs. Netherlands Ministry of Traffic,* 1951 A.M.C. 84, 88, 185 F. (2d) 555,558 (2CA), 1950:
>
> "'It would follow from that analysis that the breach of the "obligation" to furnish a seaworthy ship is a tort; and that is a result consonant with the historical attitude towards breaches of warranty, which until 1778 had to be used in tort, and which may still be so treated if the distinction is important.'" (Our emphasis.)

It should be noted here that the case upon which the Court below relied in granting a "Partial Summary Judgment" on the unseaworthiness question, *Mortenson vs. Pacific Far East Lines, Inc., supra,* was expressly disapproved in *Skovgaard.*

> "To the extent that *Graham vs. A. Lusi,* 1953 A.M.C. 2161, 206 Fed. 2d 233 (5 C.A. 1953), and *Mortenson v. Pacific Far East Lines, Inc.,* 1956 A.M.C. 2275, 148 F. Supp. 71 (N.D. Cal., 1956) express views on similar statutes of other states contrary to those expressed in this opinion, *we are in disagreement with them". Skovgaard, Admx, vs. The M/V TUNGUS,* 252 Fed. 2d 14, p. 18. (Our emphasis.)

Mortenson was similarly criticized by Mr. Justice Goldberg in his partially dissenting opinion in *Gillespie, Admx, vs. United States Steel Corp.* (1964) 379 U.S. 148, p. 159, 85 S. Ct. 308, 13 L. Ed. 2d 1199, 1965 A.M.C. 1, p. 10.

Skovgaard went to the United States Supreme Court where the Court of Appeals decision was affirmed. *The Vessel M/V TUNGUS vs. Skovgaard* (1958) 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524, 1959 A.M.C. 813. The Court held that the matter should be decided according to state interpretation of its own statute, but noted that the "New Jersey courts have simply not spoken upon the question of whether in a case such as this maritime law or common law is applicable under the State's Wrongful Death Act." *Skovgaard, supra,* 358 U.S. at p. 595. The Supreme Court said that the Court of Appeals, *en banc,* had given "careful consideration to the meaning of the state statute and it could not be said that its conclusion was clearly wrong." 358 U.S. p. 596.

Hence, the apodictic conclusion follows that an action for unseaworthiness may be based upon a state wrongful death act which provides a remedy for death by "wrongful act".

The four concurring justices in *Skovgaard* went further than the majority. Speaking through Mr. Justice Brennan this group believed that the *question of substantive law must be decided according to the federal maritime law, regardless of state law.*

> "It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care. * * * When the injured party seeks to enforce a 'state created remedy' for the breach of the federally defined duty owing to him, 'federal maritime law would be controlling'." 358 U.S. at p. 601.
>
> "It is enough for me that the State provide such a remedy in a general way (for wrongful death); the remedy is now a universal feature of the common-law system in this country, and in its essential features offers a sufficient basis for the operation of the general maritime law." 358 U.S. at p. 608.
>
> *Cf. Pope & Talbot Inc. vs. Hawn* (1953) 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143, 1954 A.M.C. 1.

See also *United New York etc. Pilots Association vs. Halecki* (1959) 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541, 1959 A.M.C. 588, and *Goett vs. Union Carbide Corporation* (1960) 361 U.S. 340 80 S. Ct. 357, 4 L. Ed. 2d 341, 1960 A.M.C., 550. The Court construes *TUNGUS* to hold that "in a maritime death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, *or* it might *choose to incorporate the general maritime law's concepts of unseaworthiness* or negligence." *Goett vs. Union Carbide Corp., supra,* 361 U. S. at p. 342. (Emphasis added.)[6]

In *Hess vs. United States* (1960) 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305, 1960 A.M.C. 527, the Court held that there was no constitutional prohibition to the application, by the maritime law, of the Oregon Employer's Liability Act (Ore. Rev. Stat. 654.305 *et. seq.*) in a death action where the result was to enlarge the survivors' rights and simplify the recovery of a verdict. Thus the Oregon Wrongful Death Act (Ore. Rev. Stat. 30.020) grounds the action on the "wrongful act or omission of another" and makes the decedent's contributory negligence a complete bar to recovery, whereas the Oregon

Employer's Liability Act imposes liability for failure to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb" and causes the decedent's contributory negligence only to mitigate damages (the maritime standard).

"* * * We find no constitutional impediment to the application, by the maritime law, of Oregon's Employers' Liability Act to a death action in which the statute would otherwise by its terms apply. We are concerned with constitutional adjudication, not with reaching particular results in given cases." *Hess, supra,* 361 U.S. at p. 320.

It should be noted that the four judge group (Chief Justice Warren and Justices Brennan, Black and Douglas) continued in *Halecki, Goett* and *Hess* to reiterate the position they had taken in *TUNGUS* to the effect that federal maritime law was completely controlling, and they reserved their position that *TUNGUS* should be overruled insofar as it held that state substantive law, where it existed, was controlling, rather than federal maritime law.

6. JUDICIAL CONSTRUCTION OF THE DEATH ON THE HIGH SEAS ACT PROVIDES A REMEDY FOR "UNSEAWORTHINESS".

The decisions in this respect are both relevant and persuasive to an affirmative determination of the question raised by our appeal.

The Federal "Death on the High Seas Act" (Act of March 30, 1920, c. 111, § 1, 41 Stat. 537. 46 U.S.C. §§761-768) provides in part:

> "Whenever the death of a person shall be caused by *wrongful act, neglect,* or default occurring on the high seas * * * the personal representative of the decedent may maintain a suit for damages in the district courts of the United States in admiralty * *." (Emphasis added.)

The federal act employs the word "default" which the California statute does not, but construction of the former statute on the application of "wrongful act" offers support to our argument.

McLaughlin vs. Blidberg Rothschild Co. Inc. (D.C. S.D N.Y. 1958) 167 F. S. 714, 1959 A.M.C. 1385, upholding the right of a seaman's administratrix to predicate a count on unseaworthiness under the Death on the High Seas Act, 167 F.S. p. 716, 1959 A.M.C. p. 1387, said,

> "Infringement of a seaman's legal right to a seaworthy ship which eventuates in harm, constituted a *'wrongful act'*. The Court of Appeals for this Circuit (Second) in *Halecki vs. United New York & New Jersey Sandy Hook Pilots Assn. (2d Cir. 1958) 251 Fed. 2d 708, 1958 A.M.C. 1262,* concurred in the views enunciated by the Third Circuit (in *Skovgaard, supra.).* The reasoning which supports the construction of the New Jersey statute warrants a like construction of the almost identical phrase in the Death on the High Seas Act." (Emphasis added.)

It will be observed that the words "wrongful act" were those determinative in application of the seaworthiness doctrine.

Chermisino vs. Vessel Judith Lee Rose Inc. (D.C. Mass. 1962) 211 F.S. 36, was in accord. There a fisherman's death occurred when unseaworthy rigging fell upon him causing fatal injuries. The defendant argued that the Death on the High Seas Act did not provide a remedy for unseaworthiness. The Court replied, 211 F.S. at p. 38,

> "The quoted language ("wrongful act, neglect or default") suggests that *something more* (than negligence)*was intended.* Had the Congress wanted to limit recovery under the Act to negligence alone, it could have so indicated by using the word "negligence" as it did in the Federal Employer's Liability Act, 45 U.S.C. Sec. 51, and by reference, in the Jones Act, 46 U.S.C. Sec. 688. The nature and scope of the duty to provide a seaworthy vessel and the extent of the warranty of seaworthiness have only recently been clearly defined, and I believe that the Death on the High Seas Act was intended to apply to *all wrongful acts* which from time to time would entitle the party damaged to maintain the action."

> "I hold that the Death on the High Seas Act gives a *remedy for breach of the warranty of seaworthiness* and that libelant may recover thereunder *without proof of negligence or culpability.*" (Emphasis added.)

Gillespie, Admx, vs. United States Steel Corp., supra, expresses views which inherently say that a remedy for unseaworthiness is included in the protection of the Death on the High Seas Act. Justice Goldberg, dissenting in part, 379 U.S. 148, p. 165,

> "This statute gives an *admiralty* remedy for wrongful death to a seaman or other person occurring on the high seas. * * From this expression of congressional purpose (Congress' purpose in enacting the Death on the High Seas Act) the Court in *TUNGUS* concluded that a suit in admiralty for death of a longshoreman resulting from *unseaworthiness* of a vessel may be maintained against the vessel's owners where the death occurs in the waters of a State which provides a statutory remedy for wrongful death." (Emphasis added.)

Justice Goldberg assumes that the Supreme Court has now settled the proposition that state wrongful death statutes where applicable to marine death cases (excluding seamen covered by the Jones Act) encompass unseaworthiness claims. He writes, 379 U.S. 148, p. 159,

> "A non seaman's death in territorial waters gives rise to an action based upon the applicable state wrongful death statute *both* for negligence and the general maritime doctrine of *unseaworthiness.*" (Our emphasis.)

The majority in *Gillespie* adds further, if peripheral, support to our contentions, with these comments, 379 U.S. p. 157,

> "And we may assume, as we have in the past, that after death of the injured person a state survival statute can preserve the cause of action for unseaworthiness."

The Court quoted from its opinion in *Kernan vs. American Dredging Co.* (1958) 355 U.S. 426, 430, 78 S. Ct. 394, 2 L. Ed. 382, 1958 A.M.C. 251, 255,

> "Where death occurs beyond a marine league from state shores, the Death on the High Seas Act * * provides a remedy for wrongful death. Presumably any claims based on unseaworthiness, for damages accrued prior to decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right."

Cf. Lindgren vs. United States (1930) 281 U.S. 1930, 50 S. Ct. 207, 74 L. Ed. 686, 1930 A.M.C. 399, *Cortes vs. Baltimore Insular Line, Inc.* (1932) 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368, 1933 A.M.C. 9.

Thus the Death on the High Seas Act has been construed to provide a remedy for unseaworthiness in those cases where the question has been raised.

7. JUDICIAL DECISIONS IN OTHER JURISDICTIONS CONSTRUING WRONGFUL DEATH STATUTES GIVE A REMEDY FOR "UNSEAWORTHINESS".

The Court of Appeals for the Second Circuit in *Halecki vs. United New York etc. Pilots Assn., supra,* construed the same New Jersey statute that the Third Circuit did in *Skovgaard vs. TUNGUS* and reached a like result, although Judge Learned Hand even thought that "neglect" included "unseaworthiness" in a maritime death case.

"We hold that *'neglect'* and 'default' both cover breach of warranty (of seaworthiness)." 1958 A.M.C. at p. 1062. (Emphasis added.)

In *Union Carbide Corp. vs. Goett, supra,* on remand from the Supreme Court, the Court of Appeals for the Fourth Circuit held that the West Virginia Wrongful Death Act (Stats. of West Va., Code, 54-7-5, *et. seq.*) which employs the words "wrongful act, neglect or default" encompassed a remedy for unseaworthiness.

The Court was definitely impressed by the decisions and views expressed in *Halecki* and *Skovgaard* by the Second and Third Circuits respectively. The Fourth Circuit construes the West Virginia statute in this manner, *Union Carbide Corp. vs. Goett* (4 Cir. 1960) 278 Fed. 2d 319, p. 321, 1960 A.M.C. 1125, p. 1127,

> "The West Virginia statute, Code, 54-7-5 *et. seq.*, like most wrongful death statutes, provides basically that if death is caused by an act, neglect or default which would have entitled the injured party to maintain an action if he had lived, then the person who would have been liable for the injury will be liable under the statute for the death. If Goett had survived he could have brought an action against Union Carbide in the West Virginia courts for the alleged negligence and *unseaworthiness*, and his right to recover in such an action would have been *governed by general maritime law*. It is true that such an action based on unseaworthiness was not recognized in 1863, when the West Virginia Wrongful Death Act was adopted, and that the principles presently controlling the negligence aspect of such an action had not been fully developed. We find, however, that the West Virginia legislature, in adopting the Wrongful Death Act, did not intend to limit recovery thereunder to actions based on the wrongful acts, neglects and defaults with which the legislators who adopted it were familiar, but that the statute was intended to cover *all wrongful acts*, neglects and defaults which from time to time would entitle an injured party to maintain an action under the applicable substantive law, whether the common law, statutory law or *maritime law*. The West Virginia courts apply all three, in appropriate cases.
>
> "We conclude that in a maritime tort death case West Virginia would 'choose to incorporate the *general maritime law's concepts of unseaworthiness or negligence*'." (Emphasis added.)

Holley, Admx, vs. Steamship MANFRED STANSFIELD (4 Cir. 1959) 269 Fed. 2d 317, 1959 A.M.C. 2189, was an action under the Virginig Wrongful Death Act (Code of Virginia, Article 3, § 8-633) for death to a longshoreman caused by the collapse of an "overhang" of the potash cargo, which condition the decedent had himself created by digging out the potash, which had solidified, with a "payloader" (a small bulldozer). Without ruling on the

question of seaworthiness, the District Court had dismissed the action because of the decedent's own negligence, relying on what it thought to be controlling state law.

The Court of Appeals for the Fourth Circuit reversed. It held that in light of *Skovgaard, supra* and *Halecki, supra,* the maritime rules of comparative negligence controlled the case, and that on a new trial it would be necessary for the District Court to make findings on "unseaworthiness and failure to provide a safe place to work". 1959 A.M.C. p.2195.

State of Maryland ex rel. Smith vs. A/S NABELLA (U.S.D.C. Md. 1959) 176 F. S. 668, 1959 A.M.C. 2196, involved the death of a longshoreman caused by the alleged unseaworthiness of defendant's vessel. Over defendant shipowner's objection, the Court held that the Maryland Wrongful Death Act (Art. 67, Ann. Code of Md., 1957 ed.) providing a recovery for death occasioned by "wrongful act, neglect or default" included a remedy for "unseaworthiness". The Court said, 176 F. S. P. 671, 1959 A.M.C. p. 2200,

> "I believe that Maryland Court would hold that the Maryland statute is not limited to the wrongful acts, neglects and defaults with which the legislators who adopted it were familiar, but that the statute was intended to apply to all wrongful acts, neglects and defaults which from time to time would entitle the party injured to maintain an action. The unseaworthiness alleged in the case at bar is such a neglect or default on the part of the shipowner, because of the onerous duty which has been placed on it by *Sieracki* and *Petterson.* I conclude that the Court of Appeals of Maryland would hold, however reluctantly, that the alleged failure of the defendant to provide a seaworthy ship, with appurtenant appliances and equipment, was a 'wrongful act, neglect or default' within the meaning of the Maryland statute."

To the same effect was *State, use of Gladden vs. Weyerhaeuser S.S. Co.* (U.S.D.C. Md. 1959) 176 F. S. 664, 1959 A.M.C. 1380. *Cf. State*

use of Maines vs. A/S NYE KRISTIANBORG (U.S.D.C. Md. 1949) 84 F.S. 775, 1949 A.M.C. 1329, *State, use of Johnson vs. United States* (4 Cir. 1948) 165 Fed. 2d 911, 1948 A.M.C. 244. The latter decision assumes that an action for unseaworthiness lies under the Maryland Wrongful Death Act, and it will be noted that this was more than ten years before *Skovgaard.*

Anthony vs. International Paper Co. (4 Cir. 1961) 289 Fed. 2d 574, 1961 A.M.C. 1890, involved interpretation of the South Carolina Wrongful Death Statute (South Carolina Code, Title 10, Ch. 23, Art. 2 § 10-1951) where death to occupants of a small boat followed its being capsized by swells from defendant's tug. Application of the appropriate navigation rules (a situation similar to *Intagliata, supra*) was the precise question involved. The Court followed *Skovgaard, Halecki* and *Goett* and held the federal general maritime law to be controlling. The Court said, 289 Fed. 2d p. 578, 1961 A.M.C. p. 1894,

> " * * * The occupants of the motorboat were drowned in the navigable waters of the State of South Carolina and recovery depends upon the applicability of the wrongful death statute of that state. * * * In the *TUNGUS* case the Supreme Court, four justices dissenting in part, held that when admiralty adopts a state's right of action it must enforce the right with whatever conditions the state has attached; and hence the federal courts cannot apply the admiralty rules to a case based on the wrongful death statute of a state unless to do so would accord with the terms of the statute as interpreted by the courts of the state. In *TUNGUS*, where the death occurred in the territorial waters of New Jersey, the courts of that state had not spoken upon the question whether in such a case the maritime or common law should apply. Nevertheless the Court of Appeals for the Third Circuit reached the conclusion (252 F. 2d 14), after careful consideration, that a claim for unseaworthiness as developed by federal maritime law was encompassed by the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 *et. seq.* as a matter of state law. The Supreme Court found itself unable to say that this conclusion was clearly wrong and therefore affirmed."

> "As will appear from our opinion in *Union Carbide Corp. v. Goett*, 4 Cir., 278 F. 2d 319, some doubt exists as to whether the view expressed by the majority or that expressed by the minority in *Tungus* represents the final position of the Supreme Court on this matter. In our judgment this uncertainty does not affect the decision to be taken in the pending case. It has been noted that the Third Circuit held in the *Tungus* case that the *wrongful death statute* of New Jersey *should be interpreted*, in the absence of any state decisions to the contrary, *as providing for the application of the principles of maritime law in case of death upon the territorial waters of the state*. We reached the same conclusion not only in our opinion in *Union Carbide Corp. v. Goett, supra*, in respect to the law of West Virginia, but also in the case of *Holley v. The Manfred Stansfield*, 4 Cir., 269 F. 2d 317, with regard to the wrongful death statute of the State of Virginia, Code 1950, § 8-633. We think, in the absence of any contrary indication by the courts of South Carolina, that the same ruling should be applied to the wrongful death statute of that state, for it is obviously desirable that the same principles be applied to wrongful death on navigable waters whether it occurs on the waters of a state or on the high seas, and also that the same standards be applied to govern conduct on the navigable waters of a state whether departure from those standards results in injury or in death. We have found nothing in the decisions of the courts of South Carolina to the contrary, and indeed it has been assumed by the District Court and by counsel for both sides that the principles of the maritime law should be applied in the pending case."
> (Our emphasis.)

Vassallo vs. Nederl-Amerik Stoomv Maats Holland (Texas S. Ct. 1961) 344 S. W. 2d 421, was a damage action for the death of a longshoreman brought under the Texas Wrongful Death and Survival Statutes (Articles 4671, *et seq.* and 5525, Vernon's Ann. Civil Stats.) in which both negligence of the vessel's owner and unseaworthiness of the vessel were charged.

The shipowner contended for a contributory negligence defense, arguing that when these statutes were enacted the maritime comparative negligence rule did not apply. The Court rejected this argument, 344 S.W. 2d p. 426,

> "Holland also argues that a statute should be interpreted as of the time of its enactment, and, applying that principle, the Survival Statute does not permit the application of the comparative negligence rule of maritime law in this case. It argues that maritime law was not available to a longshoreman until 1946, when the case of *Seas Shipping Co. v. Sieracki, supra,* was decided. We cannot agree with this contention. The comparative negligence rule of maritime law was applied in suits by longshoremen as early as 1885. See *The Max Morris*, C. C., 28, F. 881, affirmed 137 U.S. 1, 11 S. Ct. 29, 34 L. Ed. 586. The Survival Statute was not adopted by the Texas Legislature until 1925, nevertheless, meeting the test laid down in *Max Morris.*"

The Texas Wrongful Death Act provides a remedy for death resulting from

> "the wrongful act, negligence, carelessness, unskillfulness, or default (which) must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury."

The Court accordingly enforced the maritime rule of comparative negligence and assumed that the seaworthiness doctrine applied. The Court says, 344 S.W. 2d p. 424,

> " * * Under the express provisions of the Wrongful Death Act, the plaintiff is permitted to assert *any basis* for recovery that the decedent could have asserted if he were alive. * * * It follows that his contributory negligence must be considered only in mitigation of damages." (Emphasis added.)

Other cases which go back many years fortify our view that the substantive general maritime law applies, once a remedy is provided.

In *The GARLAND* (D.C. E.D. Mich. 1881) 5 Fed. 924, an action for damages in admiralty for the death of two boys in a collision of vessels on the Detroit River was successfully maintained under the Michigan statute (Act 38, 1848, p. 31) providing a remedy where death was caused by "wrongful act, neglect or default".

In *Holmes vs. O. & C. Ry. Co.* (D. C. Ore. 1880) 5 Fed. 75, a successful action was brought in admiralty under the Oregon Wrongful Death Act (Ore. Civil Code Sec. 367) for a death which occurred on state waters. The Court said, 5 Fed. p. 86,

> "The tort which caused the death of Perkins, having occurred upon the navigable waters of the United States is a marine one; and even if the maritime law does not give a remedy for the wrong, the law of the state having given the right to the administrator to recover damages therefor, this Court, as a court of admiralty, has jurisdiction of a suit to enforce such right."

In addition to *Mortenson vs. Pacific Far East Lines, supra,* (on which the Court below relied in deciding against Appellant), other cases contrary to the views we express are *Lee vs. Pure Oil Co.,* (6 Cir. 1955) 218 Fed. 2d 711, 1955 A.M.C. 820 (construing the Tennessee statute, (Tenn. Code, § 20-607 *et. seq.*) and *Graham vs. A. Lusi Ltd.,* (5 Cir. 1953) 206 Fed. 2d 233, 1953, A.M.C. 2161 (construing the Florida statute, Florida Death by Wrongful Act. sec. 768.01, F. S. A.).

Of these cases we can only say as we do of *Mortenson.* They are wrong not only in law but in justice and logic and should be disregarded in reaching the result we contend is proper.[7]

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[7] *See comment of Circuit Judge Staley in Skovgaard, supra p. 11.*

8. THAT "UNSEAWORTHINESS" IS A "WRONGFUL ACT OR NEGLECT" TAKES SUPPORT FROM THE "STRICT LIABILITY" AND "IMPLIED WARRANTY OF FITNESS" DOCTRINES, AS APPLIED IN GENERAL TORT LAW.

Varying expressions have come from the courts over the years as to what constitutes "unseaworthiness", or its converse, "seaworthiness", but the basic meaning of the doctrine and its application have in latter days become well defined.

The historical antecedent of the rule as applied to modern day usage comes from *The OSCEOLA* (1903) 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760, with this expression, 189 U.S. p. 175,

> "* * * The vessel and her owner are * * * liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a *failure to supply and keep in order the proper appliances appurtenant to the ship.*" (Emphasis added.)

A recent exposition occurs in *Gutierrez vs. Waterman Steamship Co.* (1963) 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed.2d 297, 1963 A.M.C. 1649, where it is said 373 U.S. at p. 213,

> "* * * The seaworthiness doctrine * * * is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be *reasonably fit for the purpose for which they are to be used.*" (Emphasis supplied.)

Seaworthiness has been likened to a manufacturer's warranty of product fitness. "Competency and safety of stowage are inescapable elements of the (stevedore) service undertaken. * * They are part of the stevedore's warranty of *workmanlike* service that is comparable to

a *manufacturer's warranty of the soundness of its manufactured product." Crumady vs. The JOACHIM HENDRIK FISSER* (1959) 358 U.S. 423, 429, 79 S. Ct. 445, 3 L. Ed. 2d 413, 1959 A.M.C. 580.[8]

Although it has been suggested that the right to a seaworthy ship is an incident of the seaman's contract of service, *Mahnich vs. Southern Steamship Co.* (1944) 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 1944 A.M.C. 1, it is in truth a right not grounded in or limited by contractual considerations, nor is it in any sense constrained by notions of negligence. It is, in the classic definition afforded by the Supreme Court,

> " * * Essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. * * It is a form of absolute duty owing to all within the range of its humanitarian policy." *Seas Shipping Company vs. Sieracki* (1946) 328 U.S. 85, 94, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 A.M.C. 698.

Social policy in large measure dictates the reason for the rule.

> " * * The hazards of marine service which unseaworthiness places on the men who perform it * * together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting thei

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8 *Accord: Ryan Stevedoring Co. vs. Pan-Atlantic S. S. Corp. (1956) 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133, 1956 A.M.C. 9, Italia Societa, etc. vs. Oregon Stevedoring Co. (1964) 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732, 1964 A.M.C. 1075. In these cases, the stevedore whose unseaworthy stowage, conduct or gear had caused the accident, was obliged to indemnify the shipowner who in the first instance had been held liable for unseaworthiness to the claimant.*

> burden, insofar as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this, he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost." *Seas Shipping vs. Sieracki* 328, U.S. 85, 93.

Similar considerations support "strict liability" and "implied warranty of fitness" situations.

> "The public interest in human life and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products of full responsibility for the harm they cause, even though the supplier has done his best." Prosser, *Handbook of the Law of Torts*, Third Ed., 1964, West Publ. Co., p. 673.

Reasoning akin to *Sieracki* appears in the California strict liability cases. "Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants for they can adjust the costs of such protection between them in the course of their continuing business relationship." Traynor, J. in *Vandermark vs. Ford Motor Co.* (1964) 61 Cal. 2d 256, p. 262, 391 Pac. 2d 168.

Holding that an implied warranty of fitness for consumption of food ran from the manufacturer to the consumer, independent of negligence or of contract, the California Supreme Court as far back as 1939 said, "The obligation of the manufacturer should not be based alone upon privity of contract. * * Every consideration of law and public policy require that the consumer should have a remedy." *Klein vs. Duchess Sandwich Co. Ltd.* (1939) 14 Cal. 2d 272, 280, 93 Pac. 2d 799.

That the implied warranty of fitness doctrine is encompassed by the California Wrongful Death Act and a breach thereof a tortious "wrongful act or neglect" within the meaning of the statute has been held in *Gosling vs. Nichols* (1943) 59 Cal. App. 2d 442, 139 Pac. 2d 86. There, a death resulted from consumption of tainted food. The action was abated because of defendant's death and the decision went off on that point, (it being before the adoption of the California Survival of Tort Statute, Civil Code Sec. 956 in 1949).

However, the decision offers these pertinent comments, 59 Cal. App. 2d p. 444,

> "A right of action for death by wrongful act pursuant to the provisions of section 377 of the Code of Civil Procedure is a tort action * *.
>
> * * * "The gravamen of a cause of action for breach of an implied warranty that food is fit for human consumption is the personal injury which results, and the action 'sounds in tort'. The cause of action is not ex contractu."

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The Court said, 123 Cal. App. 2d, p. 23,

> "In order for a cause of action against respondent (defendant) to have arisen, the injury to appellants (plaintiffs) must have been caused by the *wrongful act* or *neglect* of respondent, and whether considered wrongful as a breach of implied contract of warranty, or wrongful as an indirect assault upon the persons of plaintiffs, the cause would still fall within the language of subdivision 3 of section 340 of the Code of Civil Procedure."

The case is significant in that the very words used in the California Wrongful Death Act, *"wrongful act or neglect"* are here under consideration, although employed in a limitations statute. In holding that such words encompass a tortious breach of implied warranty of fitness, the analogy of a breach of the warranty of seaworthiness and its like application becomes at once apparent.

Another particularly pertinent decision is that of this Circuit in *Zellmer vs. Acme Brewing Co.* (9 Cir. 1950) 184 Fed. 2d 941, which was a damage action for the death of plaintiff's decedent and her own personal injuries, growing out of the consumption of a bottle of beer in which a dead mouse was found. The action was couched in contract and based upon breach of implied warranty of fitness, but the court affirmed a dismissal that the claim was a tort and therefor time barred by C. C. P. Section 340(3). The words "wrongful act or neglect" were said by this circuit to be "sufficiently broad to *embrace every degree of tort* that can be committed against the person (including, we believe, that for which the tort-feasor is *absolutely liable regardless of fault or negligence).*" 184 Fed. 945. (Our emphasis.)

Finally, the California Wrongful Death Act has itself been directly construed to cover actions based upon breach of implied warranty of fitness. Citing and reasoning from the California cases we have just discussed, the New York District Court concludes "that in California an action for death based upon an implied breach of warranty is within the terms of the California Wrongful Death Statute. * *" *Hinton vs. Republic Aviation Corp.* (D.C. S.D. N.Y. 1959) 180 F. S. 31, p. 37.

Ever since *Hinton* the strict liability and implied warranty rules have developed rapidly and any doubts that were noted in that opinion have now been resolved. The concurring view expressed by Justice Traynor in *Escola vs. Coca Cola Bottling Co.*(1944) 24 Cal. 2d 453, 150 Pac. 2d 436, has now become the California law. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective." Traynor, J. in *Greenman vs. Yuba Power Products Inc.* (1963) 59 Cal. 2d 57, p. 62, 377 Pac. 2d 897. See the cases there collected. Prosser, *Strict Liability to the Consumer,* 69 Yale L. J. 1099, Harper & James, *The Law of Torts, op. cit.,* Vol. 2, pp. 1569-1574.

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9. WRONGFUL DEATH STATUTES ENCOMPASS MANY WRONGS NOT BASED UPON NEGLIGENCE.

"The 'wrongful act' * * need not be based upon negligence * *. The statute (New York Wrongful Death Act, 13 McKinney's Consol. Laws of N. Y., Art. 5 Sec. 130) applies to any wrongful death, whether predicated upon facts which constitute negligence, or any other wrongful act." *Cauverien vs. DeMetz* (N.Y. 1959) 20 Misc. 2d 144, 188 N.Y.S. 2d 627, 630. In the cited case, the decedent committed suicide, and the defendants were charged with certain wilful and malicious conduct which caused decedent to take his life in a fit of temporary insanity.

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9 *Accord, Roche vs. St. John's Riverside Hospital (N.Y. 1916) 96 Misc. 289, 160 N.Y.S. 401, affirmed 176 App. Div. 885, 161 N.Y.S. 1143.*

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There are many instances of tortious conduct known to our law here negligence is absent. Such are strict liability for the keeping of nimals, the consequences of fires, or damage occurring from abnormally angerous things and activities, such as blasting. See Prosser, *Law of orts, op. cit.* pp. 506-544. Harper & James, *The Law of Torts, op. cit.*, ol. 2, pp. 785-867. Social policy dictates liability, just as it does n the seaworthiness cases.

Cf. Kernan vs. American Dredging Co., supra, pp. 15-16, holding hat in the absence of any showing of negligence the Jones Act - incorporaing the provisions of the F. E. L. A. - permitted recovery for death of seaman resulting from violation of a statutory duty.

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a *manufacturer's warranty of the soundness of its manufactured product." Crumady vs. The JOACHIM HENDRIK FISSER* (1959) 358 U.S. 423, 429, 79 S. Ct. 445, 3 L. Ed. 2d 413, 1959 A.M.C. 580.[8]

Although it has been suggested that the right to a seaworthy ship is an incident of the seaman's contract of service, *Mahnich vs. Southern Steamship Co.* (1944) 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 1944 A.M.C. 1, it is in truth a right not grounded in or limited by contractual considerations, nor is it in any sense constrained by notions of negligence. It is, in the classic definition afforded by the Supreme Court,

> " * * Essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. * * It is a form of absolute duty owing to all within the range of its humanitarian policy." *Seas Shipping Company vs. Sieracki* (1946) 328 U.S. 85, 94, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 A.M.C. 698.

Social policy in large measure dictates the reason for the rule.

> " * * The hazards of marine service which unseaworthiness places on the men who perform it * * together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their

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8 *Accord: Ryan Stevedoring Co. vs. Pan-Atlantic S. S. Corp. (1956) 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133, 1956 A.M.C. 9, Italia Societa, etc. vs. Oregon Stevedoring Co. (1964) 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732, 1964 A.M.C. 1075. In these cases, the stevedore whose unseaworthy stowage, conduct or gear had caused the accident, was obliged to indemnify the shipowner who in the first instance had been held liable for unseaworthiness to the claimant.*

> burden, insofar as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this, he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost." *Seas Shipping vs. Sieracki* 328, U.S. 85, 93.

Similar considerations support "strict liability" and "implied ranty of fitness" situations.

> "The public interest in human life and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products of full responsibility for the harm they cause, even though the supplier has done his best." Prosser, *Handbook of the Law of Torts*, Third Ed., 1964, West Publ. Co., p. 673.

Reasoning akin to *Sieracki* appears in the California strict ability cases. "Strict liability on the manufacturer and retailer alike fords maximum protection to the injured plaintiff and works no injustice the defendants for they can adjust the costs of such protection between em in the course of their continuing business relationship." Traynor, J. *Vandermark vs. Ford Motor Co.* (1964) 61 Cal. 2d 256, p. 262, 391 Pac. 168.

Holding that an implied warranty of fitness for consumption of od ran from the manufacturer to the consumer, independent of negligence of contract, the California Supreme Court as far back as 1939 said, ie obligation of the manufacturer should not be based alone upon vity of contract. * * Every consideration of law and public policy quire that the consumer should have a remedy." *Klein vs. Duchess dwich Co. Ltd.* (1939) 14 Cal. 2d 272, 280, 93 Pac. 2d 799.

That the implied warranty of fitness doctrine is encompassed by the California Wrongful Death Act and a breach thereof a tortious "wrongful act or neglect" within the meaning of the statute has been held in *Gosling vs. Nichols* (1943) 59 Cal. App. 2d 442, 139 Pac. 2d 86. There, a death resulted from consumption of tainted food. The action was abated because of defendant's death and the decision went off on that point, (it being before the adoption of the California Survival of Tort Statute, Civil Code Sec. 956 in 1949).

However, the decision offers these pertinent comments, 59 Cal. App. 2d p. 444,

> "A right of action for death by wrongful act pursuant to the provisions of section 377 of the Code of Civil Procedure is a tort action * *.
>
> * * * "The gravamen of a cause of action for breach of an implied warranty that food is fit for human consumption is the personal injury which results, and the action 'sounds in tort'. The cause of action is not ex contractu."

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> "Mere breach of contract, generally speaking, is not a tort. Yet the distinction between torts and breaches of contract is, ofttimes, so dim and shadowy that no clear line of delineation may be observed and no accurate or satisfactory definition of either may be formulated. *Rich v. New York Cent. & H.R.R. Co.*,

87 N.Y. 382; *Busch v. Interborough Rapid Transit Co.*, 187 N.Y. 388, 391, 80 N.E. 197, 10 Ann. Cas. 460. Under each cause of action whether framed in tort or on contract, default or breach of duty involves an injury. At times the same facts may warrant procedure ex contractu or ex delicto. At such times recovery is not conditioned on definition nor measured by a determination of whether it is grounded in a violation of a duty owing to another or in a breach of a contractual obligation. Nor is an action any the less on contract because the elements of damage arise out of a trespass *(Sullivan v. Dunham*, 161 N.Y. 290, 55 N.E. 923, 47 L.R.A. 715, 76 Am.St.Rep., 274) or an assault *Busch v. Interborough Rapid Transit Co., supra)*, or other personal injury *(Doedt v. Wiswall*, 15 How. Prac. 128, affirmed, 15 How. Prac. 145; *Gillespie v. Brooklyn Heights R. Co.*, 178 N.Y. 347, 70 N.E. 857, 66 L.R.A. 618, 102 Am.St. Rep. 503). Violation of a duty owing to another is a wrongful act; breach of a contract involving violation of duty may be likewise a wrongful act. Here, the duty rested on defendant to see, at its peril, that the food was fit for human consumption and it is based on considerations of public health and public policy. *Race v. Krum, supra.* Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default, and, in its essential nature, a tort. The death statute has been held to embrace an action for damages for trespass although no negligence was involved. *Sullivan v. Dunham, supra.* A similar statute has also been held to embrace an action for breach of warranty, when the breach is a violation of duty and a "wrongful act". *Greenwood v. John R. Thompson Co.*, 213 ILL. App. 371; *McLean v. Burbank*, 12 Minn 530, Gil. 438. In our own court, the breach of the implied warranty has been defined as a wrongful act. *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 395, 175 N.E. 105, 74 A.L.R. 339.

"We conclude that the breach of the warranty in a case such as this was a "default" or "wrongful act" within the meaning of those terms as used in the statute not only as a matter of definition but within the clear legislative intent. Liability here is predicated upon the "default" or "wrongful act" of the seller and the exercise of due care on the part of the purchaser.

"Under the common law, a person injured through a breach of duty imposed upon another, might in his or her lifetime, recover for such injury, but death put an end to liability of the person

> responsible for such breach. The statute was enacted to remedy partially that evil, not to perpetuate it by leaving the statute open to narrow construction."

10. IT SEEMS EVIDENT THAT THE CALIFORNIA COURTS, WERE THEY REQUIRED TO RULE, WOULD DECIDE THAT THE STATE WRONGFUL DEATH STATUTE ENCOMPASSES AN ACTION FOR UNSEAWORTHINESS.

Although an express ruling has not yet come from the United States Supreme Court that federal maritime law is controlling in the application of state wrongful death statutes with a corollary enforcement of rules allowing a recovery for unseaworthiness and application of the comparative negligence doctrine, (the position taken by the four concurring justices in *Skovgaard*), it appears from later decisions that such is the present posture of the matter. This appears to be the unmistakable conclusion to be drawn from cases like *Gillespie vs. United States Steel Corp., supra.* p. 16, and this has been the attitude expressed by other federal courts. *Cf. Union Carbide Corp. vs. Goett, Admx., supra,* 278 Fed. 2d 319, p. 321, 1960 A.M.C. 1125, p. 1127.

> "In his dissents in *Hess* and *Goett* * * Mr. Justice Whitaker, who was one of the majority of five in *Skovgaard* and *Halecki* has stated that * * * he believes such cases are governed by 'the general federal maritime law as remedially supplemented by the State's Wrongful Death Act'."

The Court itself had this to say in *Kossick vs. United Fruit Co.* (1961) 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56, at 365 U.S. p. 739,

> "In allowing state wrongful death statutes, *The Tungus vs. Skovgaard*, 358 U.S. 588. *The Hamilton*, 207 U.S. 398, 28 S. Ct. 133, 52 L. Ed. 264, and state survival of actions statutes, *Just vs. Chambers*, 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903, respectively, to grant and to preserve a cause of action based ultimately on a wrong committed within the admiralty jurisdiction, and defined by admiralty law, this Court has attempted an accomodation between a liability dependent primarily upon the breach of a maritime duty and state rules governing the extent of recovery for such breach. The intrusion of these state remedial systems need not bring with it any undesirable disuniformity in the scheme of maritime law."

We believe the California courts would unhesitatingly follow such a course, and enforce the federal maritime law, while allowing a state remedy. *Intagliata vs. Shipowners, supra.*

Not many maritime cases have reached the California appellate courts, but those which have do recognize the paramount and controlling nature of federal maritime law. In a death case under the Jones Act, *Rouchleau vs. Silva* (1950) 25 Cal. 2d 355, p. 358, 217 Pac. 2d 929, the Supreme Court of California says, "It may be assumed that parties to an action in a state court are entitled to the rights afforded them under federal law in admiralty matters."

Gillian vs. California Employers Stabilization Comm. (1955) 130 Cal App. 2d 102, 278 Pac. 2d 528, was a case where the matter under consideration was the effect "maintenance and cure" had on seamen's rights to state unemployment benefits. In holding these maritime rights were separate and apart and no bar to rights otherwise available under California law, the Court said, 130 Cal. App. 2d, p. 112, "State courts must determine

the rights of the parties under the maritime law 'as a system of law coextensive with and operating uniformly in, the whole country'." (This was express recognition of the *Jensen* doctrine.)

O'Hey vs. Matson Navigation Co. (1955) 135 Cal. App. 2d 819, 288 Pac. 2d 81, was a longshoreman's personal injury action based on a claim of unseaworthiness, in which a verdict for the plaintiff was affirmed on appeal, the Court having occasion to review and follow federal law. *Sieracki vs. Seas Shipping Co., supra.*

Two well considered New York cases, *Kuhn vs. City of New York* (N.Y. Ct. App. 1937) 274 N.Y. 118, 8 N.E. 2d 300, and *Riley vs. Agwilines, Inc.* (N.Y. Ct. App. 1947) 296 N.Y. 402, 73 N.E. 2d 718, support our position. These were maritime death suits brought in the state court under the Saving Clause, 28 U.S.C. Sec. 1333 (1) and were based upon maritime theories of negligence and unseaworthiness. The New York Court of Appeals recognized that the New York Wrongful Death Act provided only the remedy and that federal law was the source of substantive application. "We must look to the decisions of the Federal courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our courts or statutes of the State which conflict with the rules of liability established in the Federal courts." *Riley vs. Agwilines,* 296 N.Y. 402, 405, 406, 73 N.E. 2d, p. 719.

In *Kuhn vs. City of New York, supra,* a death action was brought under the New York Statute, and the vessel on which a boiler had exploded was found to be unseaworthy. It was assumed that "seaworthiness" was a protected right. The Court says, *Kuhn vs. City of New York,* 8 N.E. 2d 300, p. 304,

> "* * * While any appropriate remedy afforded by the common law and the New York Death Statute is saved * * * The Substantive rights and obligations of the parties arose not out of local law of New York state, but under the maritime law of the United States * * * Notwithstanding the action is brought in the state court, the principles and rules of the substantive maritime law are alone to be applied as grounds, if any, for recovery."

The California statute will be liberally construed. Thus where the statute of limitations has not barred one of the parties on account of his infancy at the time the cause of action arose, it will not bar the other parties who otherwise would be time barred. *Nolan vs. Trans Ocean Air Lines* (1961) 365 U.S. 293, 81 S. Ct. 555, 5 L. Ed. 2d 571, relying on *Leeper vs. Beltrami* (1959) 53 Cal. 2d 195, 347 Pac. 2d 12.

It must be remembered that the California Wrongful Death Act was first adopted in 1872. Many sociological and scientific developments have followed with the years. Advances in science and technology have occurred which were undreamed of then -- automation, communication, the conquest of the air, of the ocean, and of space. Industry, agriculture, business and government - modern man - continue to embark on ever more remarkable adventures.

Certainly the law is no laggard. It cannot fall behind while the rest of society advances. Ours should be a dynamic and living law, ready to meet every challenge of a changing social order.

The law of 1872 must meet the needs of 1965. The words are there.[10] In the small arena in which our case is cast, the statute can be applied

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10. Compare the language in Goett, supra p. 18.

to meet the broadest contemporary need, just as the Constitution of 1787 has been interpreted to meet the most exacting demands of modern times. All that is required is a bold approach to the solution of a problem which by such answer would do no violence to law or logica, but indeed would serve both.

The first modern concept of "unseaworthiness" did not come until 1903 in *The OSCEOLA*. The rule developed until its modern day expansion to protect longshoremen and all who did ship's work as expounded in 1946 in *Sieracki*. It has even gone ashore in *Gutierrez*. As need required, the Supreme Court fashioned the doctrine to satisfy the times - and always to obtain a necessary social result.[11]

But, as the seaworthiness doctrine has grown, so has the law in many fields, and one of those most pertinent to our case - in the area of "strict liability" and "implied warranty of fitness". "The requirement of timely notice of breach of warranty (Civil Code § 1769) is not applicable to such tort liability just as it is not applicable to tort liability based on negligence." *Vandermark vs. Ford Motor Co., supra,* 61 Cal. 2d, p. 263.

The same philosophy of justice permeated the legislatures which enacted the wrongful death statutes. These were intended to alleviate wrongs which existed in an archaic past. Their interpretation must be no less generous.

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11 *See Mahnich vs. Southern Steamship Co., supra,* and *Mitchell vs. Trawler Racer Inc. (1960) 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, 1960 A.M.C. 1503, which trace the growth and development of the doctrine. Notions of transitoriness and notice are foreign to its application.*

Mr. Justice Cardozo said it well in *Van Beeck vs. Sabine Towing Co.* (1937) 300 U.S. 342, 57 S. Ct. 452, 81 L. Ed. 685, 1937, A.M.C. 311, 300 U.S., p. 350,

> "Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. * *
>
> There are times when *uncertain words are to be wrought into consistency and unity* with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed'. * * * Its intimation is clear enough in the statutes now before us that *their effects shall not be stifled without the warrant of clear necessity, by the perpetuation of a policy which now has had its days.*" (Our emphasis.)

V.

CONCLUSION

We are dealing here with a matter of general maritime concern. It is an area where "concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging." *Weinstein vs. Eastern Airlines* (3 Cir. 1963) 316 Fed. 2d 758, 763.

"We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned. * *" Mr. Chief Justice Hughes in *Detroit Trust Co. v. The THOMAS BEACHEM* (1934) 293 U.S. 21, 52, 55 S. Ct. 31, 41, 79 L. Ed. 176.

Any question or uncertainty in the construction of the California Wrongful Death Act in its maritime application must be resolved in the broadest and most protective manner to achieve results consistent not only with the remedial purpose of the statute, but also with the like purposes of the admiralty itself.

"If we would guide by the light of reason, we must let our minds be bold." Mr. Justice Brandeis dissenting in *New State Ice Co. vs. Liebman* (1932) 283 U.S. 262, 309-311.

It is respectfully submitted that the judgment below must be reversed.

Dated at San Francisco on September 21, 1965.

Redland and Pinney

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of the within Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my Opinion, the within Brief is in full compliance with those Rules.

VAN H. PINNEY
Attorney for Appellant

Appendix A

CALIFORNIA WRONGFUL DEATH ACT

California Code of Civil Procedure, Section 377

Wrongful death of adults or certain minors; action by personal representatives; death of wrongdoer; damages; consolidation of actions

"When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 956 of the Civil Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the pro-

visions of Section 956 of the Civil Code, such actions shall be consolidated for trial on the motion of any interested party." (Enacted 1872. As amended Code Am. 1873-74, c. 383, p. 294, § 40; Stats. 1935, c. 108, p. 460, § 1: Stats. 1949, c. 1380, p. 2401, § 4.)

Appendix B

DEATH ON THE HIGH SEAS ACT

46 U. S. C., Sec. 761

Right of action; where and by whom brought

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." (Mar. 30, 1920, c. 111, §§ 1, 41 Stat. 537.)

Appendix C

Jones Act

46 U. S. C., Section 688

Recovery for injury to or death of seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.)